## KONSORTIUM LORD-SABERKAT SDN BHD v. RP CHEMICALS (MALAYSIA) SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
IDRUS HARUN JCA
SURAYA OTHMAN JCA
STEPHEN CHUNG JCA
[CIVIL APPEALS NO: W-02(NCVC)(W)-2391-11-2017 &
W-02(NCVC)(W)-2392-11-2017]
7 NOVEMBER 2018

***ARBITRATION:*** *Award – Setting aside – Application for – Parties entered into agreement for transport services ('TSA') and trust deed – Disputes arose due to appellant's failure to return trailers to respondent – Appellant claimed for payment for outstanding charges, balance of goodwill and for maintenance of trailers – Appellant dissatisfied with final award handed down by arbitrator – Whether appellant restricted or prevented from enforcing rights under TSA – Whether limitation an issue – Deregistration and asset transfer of trailers took place 27 months after expiry of TSA – Whether appellant complied with terms of offer for balance of goodwill payment – Appellant required to maintain trailers in roadworthy conditions before delivering them to respondent – Whether appellant entitled to maintenance costs – Whether reasonable to impose liability on respondent for loss of profit and depreciation – Arbitration Act 2005, ss. 37 & 42*

The appellant and the respondent entered into a purchase agreement for transport services ('TSA') and a trust deed. Under the TSA, the appellant agreed to transport the respondent's purified terephthalic acid contained in specialised trailers of the respondent to be attached to the appellant's prime movers. The trailers and prime movers were required to be registered in the appellant's name to comply with the regulations of Jabatan Pengangkutan Jalan ('JPJ') and the Surahanjaya Pengangkutan Awam Darat ('SPAD'). Therefore, the appellant agreed to hold 22 trailers on trust for the respondent pursuant to the trust deed. The appellant delivered the JPJK3 Registration Forms ('JPJK3 forms') in escrow to the respondent for safekeeping. After expiry of the TSA and trust deed, the appellant returned six of the 22 trailers to the respondent but did not return the other trailers on the ground that it could not register them under the respondent's name because the respondent had misplaced the relevant JPJK3 forms. Disputes arose between the parties and the respondent filed a suit against the appellant for failure to return the trailers. The appellant applied for stay of the proceedings pending arbitration, which was allowed. In the arbitration, the appellant claimed against the respondent, *inter alia,* the following (i) RM3,008,681.03 based on six invoices for outstanding charges for services rendered ('Claim 1'); (ii) USD60,000 being the balance of agreed goodwill payment ('Claim 2');

and (iii) RM6,958,873.90 for maintenance of 15 trailers pursuant to agreed fixed charges under the TSA ('Claim 3'). The arbitrator delivered the final award and allowed in part the appellant's claim in respect of one invoice but dismissed all other claims. The appellant filed an originating summons ('OS39') pursuant to ss. 37 and 42 of the Arbitration Act 2005 ('Arbitration Act') seeking, among others, that the final award be set aside. Some of the questions of law raised before the High Court were (i) whether cls. 13 and 30 of the TSA which limited the time to make a claim within 30 days were against s. 6 of the Limitation Act 1953 ('Limitation Act') read together with s. 29 of the Contracts Act 1950 ('CA') which provides that the limitation period is 6 years making cls. 13 and 30 of the TSA void under s. 29 of the CA; (ii) whether the respondent should have paid the balance goodwill payment of USD 60,000 to the appellant and that the arbitrator should not have adopted an inconsistent stand over a similar issue; and (iii) whether the appellant was entitled to claim the costs of maintenance which were incurred between certain dates, which was after the expiry of the TSA, where the 15 trailers were in the possession of and maintained by the appellant pending the return of the documents to de-register and re-transfer the trailers into the respondent's name which was allegedly the fault of the respondent. The appellant also filed originating summons ('OS8') in another court for the final award to be set aside pursuant to s. 37 of Arbitration Act. Both originating summons were directed to be heard together. After considering the affidavits and submissions of both parties, the Judicial Commissioner ('JC') dismissed both OS39 and OS8. Thus, these appeals.

**Held (dismissing appeals with costs)**
**Per Stephen Chung JCA delivering the judgment of the court:**

**(1)** The provisions of the TSA must be read together and in harmony with each other. Clause 30 required the appellant to submit invoices to the respondent each month, no later than the 15th of the following month, for which the services were billed, and if any item or items were disputed, the respondent might withhold payment until such time as the dispute was resolved. Under cl. 13 of TSA, the appellant was not only required to maintain complete and accurate records related to amounts billed to and payments made by the respondent, but to provide supporting documentation concerning any disputed invoice or payment within 30 days after the respondent notified the appellant of the dispute which would be subject to final adjustment and to be settled under cl. 9. These provisions did not restrict the appellant from enforcing his rights under the TSA. The arbitrator had questioned the veracity of the appellant's claim in respect of these six invoices in failing to comply with the requirements of cls. 13 and 30 and in failing to provide sufficient proof of its claim. The arbitrator did not rule that the appellant's claim was caught by limitation. These were findings of facts. (paras 38 & 39)

**(2)** Under s. 29 of the CA, every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent. Pursuant to Exception 1 and Exception 2 of s. 29, this section shall not render illegal a contract or any contract in writing by which the parties agree any dispute between them be referred to arbitration. The parties had agreed to the arbitration agreement, had already referred their disputes to arbitration and the arbitrator had delivered his final award. The appellant was not and had not been restricted nor prevented from enforcing his rights under the TSA. Therefore, cl. 30, or for that matter cls. 9 and 13, were not void by virtue of s. 29 of the CA and limitation was not and could not be an issue. (para 40)

**(3)** The goodwill payment was not provided for in the TSA or trust deed but in an email sent out to ensure safe, smooth and staggered operations in managing the transition, which included a programme to prepare deregistration and asset transfer. The parties did not refer to any programme or specific plan to prepare deregistration and asset transfer and the timeline to do so. The deregistration and asset transfer of the remaining trailers only took place 27 months after the expiry of the TSA and trust deed. It was clear the appellant did not comply with the terms of offer for the balance of goodwill payment as set out in the email and it was not a smooth operation for deregistration and asset transfer. The arbitrator had made a finding that the goodwill payment would only be payable if the appellant had carried out the obligations to physically transfer the ownerships of the trailers in accordance to the terms of the letter. He was not plainly wrong in the finding which he did, given the factual matrix of the case. (paras 42 & 43)

**(4)** On a plain reading of cl. 7, read together with cl. 36 of the TSA, the appellant shall deliver the trailers to the respondent in roadworthy conditions free of all costs to the respondent save and except for prescribed statutory costs of registering the transfers. There was no submission that cl. 7, which the appellant relied on, was void, irrational or not applicable. The words 'free of all costs to the respondent' meant that the respondent was not required and did not have to pay the maintenance costs incurred by the appellant to maintain the trailers in roadworthy conditions before they were delivered to the respondent, notwithstanding that the TSA and trust deed had expired. Thus, the appellant was not entitled to be paid the maintenance costs incurred. (para 49)

**(5)** There was no allegation of and there was no breach of contract or that there was a duty of care which entitled the appellant to damages or consequent loss of profit. Instead the TSA and trust deed had expired some 27 months ago and it was for the appellant to return the trailers to the respondent as soon as possible. The appellant could easily and quickly provide the replacement forms to be signed and registered and for its prime movers to be de-coupled from the trailers so that the appellant could put the prime movers to other commercial or business use instead of waiting until March 2014 and allegedly incurring costs, loss of profit and depreciation. There was no finding that the respondent had deprived the appellant from using its prime movers upon expiry of the TSA and trust deed. The claims for loss of profit and depreciation of value of its prime movers were unproven and too remote to be recoverable as damages. It was not fair and reasonable to impose liability on the respondent for the loss of profit and depreciation. Thus, the appellant was not entitled to the loss of profit and depreciation claimed. (paras 54 & 55)

***Bahasa Malaysia*** *Headnotes*

Perayu dan responden memasuki satu perjanjian pembelian perkhidmatan pengangkutan ('TSA') dan surat ikatan amanah. Bawah TSA, perayu bersetuju untuk mengangkut asid tereftalik tulen yang terkandung dalam treler khusus responden untuk disangkutkan pada penggerak utama perayu. Treler-treler dan penggerak-penggerak utama perlu didaftarkan atas nama perayu supaya mematuhi peraturan-peraturan Jabatan Pengangkutan Jalan ('JPJ') dan Suruhanjaya Pengangkutan Awam Darat ('SPAD'). Oleh itu, perayu bersetuju untuk memegang 22 treler dalam amanah untuk responden menurut surat ikatan amanah. Perayu menyerahkan Borang Pendaftaran JPJK3 ('borang-borang JPJK3') dalam eskrow kepada responden untuk jagaan. Selepas tamat tempoh TSA dan surat ikatan amanah, perayu mengembalikan enam daripada 22 treler kepada responden tetapi tidak mengembalikan treler-treler lain atas alasan ia tidak dapat didaftar atas nama responden kerana responden telah tersalah letak borang-borang relevan JPJK3. Pertikaian timbul antara pihak-pihak dan responden memfailkan guaman terhadap perayu kerana gagal mengembalikan treler-treler. Perayu memohon penangguhan prosiding sementara menunggu timbang tara, dan ini dibenarkan. Semasa timbang tara, perayu menuntut terhadap responden, antara lain (i) RM3,008,681.03 berdasarkan invois-invois untuk bayaran-bayaran untuk perkhidmatan yang diberikan ('Tuntutan 1'); (ii) USD60,000 sebagai baki pembayaran muhibah yang dipersetujui ('Tuntutan 2'); dan (iii) RM6,958,873.90 untuk penyenggaraan 15 buah treler menurut bayaran tetap yang telah dipersetujui bawah TSA ('Tuntutan 3'). Penimbang tara

menyampaikan award muktamad dan membenarkan sebahagian tuntutan perayu berkenaan salah satu invois tetapi telah menolak tuntutan-tuntutan lain. Perayu memfailkan saman pemula ('OS39') menurut ss. 37 dan 42 Akta Timbang Tara 2005 ('Akta') menuntut, antara lain, supaya award muktamad itu diketepikan. Beberapa persoalan undang-undang yang dibangkitkan di hadapan Mahkamah Tinggi adalah (i) sama ada kl. 13 dan 30 TSA yang mengehadkan masa untuk membuat tuntutan dalam tempoh 30 hari bertentangan dengan s. 6 Akta Had Masa 1953 ('Akta Had Masa') dibaca bersama s. 29 Akta Kontrak 1950 ('AK') yang memperuntukkan tempoh had masa adalah enam tahun membuatkan kl. 13 dan 30 TSA terbatal bawah s. 29 AK; (ii) sama ada responden harus membayar baki bayaran muhibah USD60,000 kepada perayu dan penimbang tara tidak sepatutnya mengamalkan pendirian yang tidak konsisten ke atas isu yang sama; dan (iii) sama ada perayu berhak menuntut kos-kos penyenggaraan yang ditanggung pada tarikh-tarikh tertentu, iaitu selepas tamat tempoh TSA, di mana 15 treler berada dalam milikan dan disenggarakan oleh perayu sementara menunggu pengembalian dokumen-dokumen untuk membatalkan pendaftaran dan membuat pemindahan semula treler-treler atas nama responden yang dikatakan adalah kekhilafan responden. Perayu juga memfailkan saman pemula ('OS8') di mahkamah lain untuk award muktamad diketepikan menurut s. 37 Akta Timbang Tara. Kedua-dua saman pemula diarahkan didengar bersama. Selepas mengambil kira afidavit-afidavit dan hujahan kedua-dua pihak, Pesuruhjaya Kehakiman ('PK') menolak kedua-dua OS39 dan OS8. Oleh itu, rayuan-rayuan ini.

**Diputuskan (menolak rayuan-rayuan dengan kos)**
**Oleh Stephen Chung HMR menyampaikan penghakiman mahkamah:**

**(1)** Peruntukan-peruntukan TSA harus dibaca bersama-sama dan secara harmoni antara satu sama lain. Klausa 30 memerlukan perayu menyerahkan invois-invois kepada responden setiap bulan, tidak lewat dari 15 hari bulan pada bulan yang seterusnya, yang perkhidmatannya dibilkan, dan jika mana-mana item dipertikaikan, responden akan menahan bayaran sehingga pertikaian diselesaikan. Bawah kl. 13 TSA, perayu bukan hanya perlu menyenggara rekod-rekod yang lengkap dan tepat berhubungan jumlah-jumlah yang dibilkan dan bayaran-bayaran yang dibuat oleh responden, tetapi juga untuk memberi dokumentasi-dokumentasi berhubungan apa-apa invois atau bayaran yang dipertikaikan dalam tempoh 30 hari selepas responden memberi notis pada perayu berkenaan pertikaian yang akan tertakluk pada pelarasan akhir dan akan diselesaikan bawah kl. 9. Peruntukan-peruntukan ini tidak mengehadkan perayu daripada menguatkuasakan hak-haknya bawah TSA. Penimbang tara telah menyoal kesahihan tuntutan perayu berkenaan enam invois apabila gagal mematuhi keperluan-keperluan

kl. 13 dan 30 dan atas kegagalan memberikan bukti yang memadai untuk tuntutannya. Penimbang tara tidak memutuskan tuntutan perayu dihalang oleh had masa. Ini adalah dapatan-dapatan fakta.

**(2)** Bawah s. 29 AK, setiap perjanjian, apabila mana-mana pihak dihadkan sepenuhnya dari menguatkuasakan hak-haknya bawah atau berkenaan apa-apa kontrak, oleh prosiding undang-undang biasa dalam tribunal-tribunal biasa, atau yang mengehadkan masa dalam tempoh di mana dia boleh menguatkuasakan hak-haknya, tidak sah setakat itu. Menurut Pengecualian 1 dan Pengecualian 2 dari s. 29, seksyen ini tidak boleh menyebabkan kontrak tidak sah atau apa-apa kontrak bertulis di mana pihak-pihak bersetuju apa-apa pertikaian antara mereka akan dirujuk pada timbang tara. Pihak-pihak bersetuju dengan perjanjian timbang tara, telah merujuk pertikaian-pertikaian pada timbang tara dan penimbang tara telah menyampaikan award yang muktamad. Perayu tidak dihadkan atau dihalang menguatkuasakan hak-haknya bawah TSA. Oleh itu, kl. 30 serta kl. 9 dan kl. 13, tidak tidak sah menurut kuasa s. 29 AK dan had masa bukan satu isu.

**(3)** Bayaran muhibah tidak diperuntukkan dalam TSA atau surat ikatan amanah tetapi dalam satu emel yang dihantar untuk memastikan operasi yang selamat, licin dan berperingkat dalam menguruskan peralihan, yang termasuk program menyediakan pembatalan pendaftaran dan pemindahan aset. Pihak-pihak tidak merujuk pada mana-mana program atau perancangan spesifik bagi menyediakan pembatalan pendaftaran dan pemindahan aset dan had masa untuk berbuat demikian. Pembatalan pendaftaran dan pemindahan aset treler-treler yang masih kekal hanya dibuat 27 bulan selepas tamat tempoh TSA dan surat ikatan amanah. Jelas sekali perayu tidak mematuhi syarat-syarat tawaran baki bayaran muhibah seperti yang dibentangkan dalam emel dan ia bukanlah satu operasi licin pembatalan pendaftaran dan pemindahan aset. Penimbang tara membuat dapatan bahawa bayaran muhibah hanya akan dibayar jika perayu melaksanakan obligasi-obligasinya untuk secara fizikal memindahkan hak milik treler-treler menurut syarat-syarat surat. Penimbang tara tidak salah dalam dapatannya berdasarkan fakta matriks kes.

**(4)** Pada bacaan biasa kl. 7, dibaca dengan kl. 36 TSA, perayu harus menyerahkan treler-treler kepada responden dalam keadaan yang sesuai untuk digunakan bebas daripada segala kos pada responden kecuali kos-kos statutori mendaftar pemindahan. Tiada hujahan bahawa kl. 7, yang telah dirujuk oleh perayu, tidah sah, tidak rasional atau tidak boleh dipakai. Perkataan-perkataan 'free of all costs to the respondent' bermaksud responden tidak perlu membayar kos penyenggaraan yang

ditanggung perayu untuk menyenggara treler-treler dalam keadaan sesuai untuk digunakan sebelum diserahkan kepada responden, walaupun TSA dan surat ikatan amanah telah tamat tempoh. Oleh itu, perayu tidak berhak dibayar kos-kos penyenggaraan yang ditanggungnya.

**(5)** Tiada dakwaan atau tiada pelanggaran kontrak serta tiada kewajipan berjaga-jaga yang memberi hak kepada perayu menuntut ganti rugi atau kerugian keuntungan. Sebaliknya, TSA dan surat ikatan amanah telah tamat tempoh 27 bulan yang lalu dan perayu perlu mengembalikan treler-treler kepada responden secepat mungkin. Perayu boleh dengan mudah dan cepat menyediakan borang-borang penggantian untuk ditandatangani dan didaftar dan untuk penggerak utama dinyahganding daripada treler-treler supaya perayu boleh menggunakan penggerak-penggerak utama itu sebagai kegunaan komersial atau perniagaan dan bukannya menunggu sehingga Mac 2014 dan menanggung kos, kehilangan keuntungan dan susutan nilai. Tiada dapatan bahawa responden telah melucutkan perayu daripada menggunakan penggerak utamanya apabila tamat tempoh TSA dan surat ikatan amanah. Tuntutan untuk kerugian keuntungan dan susutan nilai penggerak-penggerak utama itu gagal dibuktikan dan terlalu terpencil untuk dipulihkan sebagai ganti rugi. Tidak adil dan munasabah untuk mengenakan liabiliti ke atas responden untuk kehilangan keuntungan dan susutan nilai. Oleh itu, perayu tidak berhak untuk menuntut kehilangan keuntungan dan susutan nilai.

**Case(s) referred to:**

*Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC* ***(refd)***

*Giacomo Costa Fu Andrea v. British Italian Trading Co Ltd [1961] 2 Lloyd's Rep 392* ***(refd)***

*MRI Trading AG v. Erdenet Mining Corporation LLC [2013] 1 All ER (Comm) 1* ***(refd)***

*New Zealand Insurance Co Ltd v. Ong Choon Lin [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230 SC* ***(refd)***

*Tenaga Nasional Malaysia v. Batu Kemas Industri Sdn Bhd & Another Appeal [2018] 6 CLJ 683 FC* ***(refd)***

*Vinava Shipping Co Ltd v. Finelvet AG 'The Chrysalis' [1983] 2 All ER 658* ***(refd)***

**Legislation referred to:**

Arbitration Act 2005, ss. 8, 37(1)(a), (b), (2), 42(1), (1A)
Contracts Act 1950, s. 29
Limitation Act 1953, s. 6
Motor Vehicles (Registration and Licensing) Rules 1959, r. 9(1)

*For the appellant - Ben Chan Chong Choon & Chin Yu Yen; M/s Megat Najmuddin Leong & Co*

*For the respondent - Vijay Raj Balasupramaniam & Tan Hui Wen; M/s Skrine*

*[Editor's note: For the High Court judgment, please see Konsortium Lord-Saberkat Sdn Bhd v. RP Chemicals (Malaysia) Sdn Bhd [2018] 1 LNS 584 (affirmed).]*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Stephen Chung JCA:**

### Factual Background

**[1]** The appellant and the respondent entered into a purchase agreement for transport services (TSA) and a trust deed, both dated 21 June 2005, for a period of five years from 1 July 2005 to 30 June 2010 which were subsequently extended to 31 December 2011.

**[2]** Under the TSA, the appellant agreed to transport the respondent's purified terephthalic acid contained in specialised trailers of the respondent to be attached to the appellant's prime movers.

**[3]** The trailers and prime movers were required to be registered in the appellant's name to comply with the regulations of Jabatan Pengangkutan Jalan (JPJ) and the Suruhanjaya Pengangkutan Awam Darat (SPAD). Therefore the 22 trailers were registered under the appellant's name and agreed to hold the trailers on trust for the respondent pursuant to the trust deed. The appellant delivered the JPJK3 Registration Forms ("Borang Penyata Pertukaran Milikan Kenderaan Motor Secara Sukarela oleh Pemunya Berdaftar") in-escrow to the respondent for safe-keeping.

**[4]** After expiry of the TSA and trust deed, the appellant returned six of the 22 trailers to the respondent but did not return the other trailers on the ground that it could not register them under the respondent's name because the respondent had misplaced the relevant JPJK3 forms. The appellant required the respondent to lodge a police report, provided a statutory declaration and a letter of indemnity before the remaining trailers could be transferred to the respondent.

**[5]** Disputes arose between the parties and in 2013 the respondent filed a suit against the appellant for failure to return the trailers and the appellant applied for stay of the proceedings pending arbitration which was dismissed. On appeal, the Court of Appeal granted the stay and made an order for the disputes to be referred to arbitration under the Arbitration Act 2005 (Act 2005). In the arbitration, in its statement of claim, the appellant claimed against the respondent the following:

(a) RM3,008,681.03 based on six invoices for outstanding charges for service rendered between 8 April 2010 and 11 January 2012 (claim 1);

(b) USD60,000 being the balance of agreed goodwill payment (claim 2);

(c) RM6,958,873.90 for maintenance of 15 trailers between 12 January 2012 to 2 April 2014 pursuant to agreed fixed charge under TSA (claim 3);

(d) interest at 5% per annum on the outstanding sum of RM9,967,554.93 calculated from the due date of the respective invoices until the date of the award;

(e) loss of profit of not less than RM2,570,256 from January 2012 to March 2014 as a result of the respondent's delay in effecting the de-registration of the trailers which effectuated the prime movers being commercially idle and depreciated in value;

(f) damages for loss of commercial usage of prime movers to be assessed;

(g) damages for depreciation in value prime movers to be assessed; and

(h) costs of the arbitration be borne by the respondent.

**[6]** On 3 November 2016 the arbitrator delivered the final award as follows:

(a) the appellant's claim in respect of invoice KLSSB/SP/002 was allowed in part for RM212,500;

(b) all other claims were dismissed;

(c) the respondent's counter-claim was dismissed; and

(d) interest at 5% on the sum awarded, on the costs of the arbitration and legal costs.

**[7]** The plaintiff filed an originating summons WA-24NCC(ARB)-39-12-2016 (OS39) pursuant to ss. 37 and 42 of Act 2005 seeking, among others, that (i) the final award be varied and/or set aside, (ii) the final award be remitted in whole or in part for reconsideration, and/or (iii) the final award be set aside in whole or in part.

**[8]** In this application, the appellant raised nine 'questions of law' before the High Court.

**[9]** Two months later, the plaintiff filed originating summons WA-24NCC(ARB)-8-02-2017 (OS8) in another court for the final award to be set aside pursuant to s. 37 of Act 2005.

**[10]** By a court order dated 15 March 2017, both originating summons were directed to be heard together. After considering the affidavits and submissions of both parties, the learned Judicial Commissioner (JC) dismissed both OS39 and OS8.

**[11]** The appellant has filed the two appeals against the decision of the learned JC and both appeals were heard together before us. For ease of reference, we shall refer to these two appeals as OS39 and OS8 respectively. We have read the submissions and authorities cited.

**The Appellant's Submission**

**[12]** The appellant submitted that the learned JC had completely ignored the established principles that where the question referred is a question of construction of a document, it is a question of law and had the learned JC approached the law in the right way, she would have no difficulty to arrive at a decision that the questions posed by the appellant are questions of law arising out of the award.

**[13]** It was submitted that in the High Court, the appellant had posed several questions of law, including whether cls. 13 and 30 of the TSA which limited the time to make a claim within 30 days were against s. 6 of the Limitation Act 1953 read together with s. 29 of the Contracts Act 1950 (CA) which provides that the limitation period is six years making cls. 13 and 30 of the TSA to be void under s. 29 of CA, citing the case of *New Zealand Insurance Co Ltd v. Ong Choon Lin* [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230; [1992] 1 MLJ 185 per KC Vohrah J at p. 195 in support of its contention.

**[14]** The appellant submitted that it was not in dispute that the respondent in its email dated 27 July 2011 agreed to offer the appellant "a goodwill payment of total USD120,000 (into two payments) and it was also not in dispute that the first payment of USD60,000 had been paid in October 2011. It submitted that having properly construed the question of law, the respondent should have paid the balance goodwill payment of USD60,000 to the appellant and that the arbitrator should not have adopted an inconsistent stand over a similar issue.

**[15]** The appellant submitted that it was entitled to claim the costs of maintenance of RM6,958,873.90 which were incurred between 12 January 2012 to 2 April 2014, which was after the expiry of the TSA, where the 15 trailers were in the possession of and maintained by the appellant pending the return of the documents to de-register and re-transfer the trailers into the respondent's name which was the fault of the respondent.

**[16]** It submitted that the learned JC had erred in ruling that the OS questions (1), (2) and (3) did not pose real and legitimate questions of law as the appellant was relying on the finding of facts made by the arbitrator to dispute the correctness of the arbitrator's decision.

**[17]** It was submitted that OS questions (5), (6), (7) and (9) relate to the appellant's claim (4) for loss of profits and claim (5) for the loss of commercial usage and depreciation in value of its prime movers which arose from being deprived of the use of its prime movers for other business because the decoupling process between the appellant's prime movers and the respondent's trailers were pending at the material time.

**[18]** It submitted that applying the finding of facts of the arbitrator to the correct application of law of damages led inevitably to one answer, that the appellant was entitled to claim for loss of profit after having been deprived of the use of its prime movers caused by the default and delay of the respondent and this failure to give effect to such findings gave rise to a question of law warranting the intervention of this appellate court to set aside, citing the case of *MRI Trading AG v. Erdenet Mining Corporation LLC* [2013] 1 All ER (Comm) 1.

**[19]** The appellant submitted that the arbitrator had wrongly relied on the opinion given by the respondent's witness RW4 which was a mere expression of opinion on a point of law which was for the arbitrator to determine. It was submitted that the arbitrator could not obtain legal assistance on a specific question of law in issue in the arbitration proceedings and any enquiry made by the arbitrator must be limited to the general principles of law. It submitted that the arbitrator must not adopt somebody else's view instead of making up his own mind, referring to *Giacomo Costa Fu Andrea v. British Italian Trading Co Ltd* [1961] 2 Lloyd's Rep 392.

**[20]** The appellant also complained that in the arbitration proceedings, the arbitrator was biased and wrong to suggest or propose to the respondent to call additional witness to rebut the appellant's contentions on the issue of coupling of the appellant's prime movers to the respondent's trailers.

**[21]** The appellant complained therefore there had been breaches of natural justice on the part on the arbitrator, including he (a) failed to consider issues which were put before him by the parties; (b) took into account irrelevant considerations and failed to take into account relevant considerations; (c) misdirected himself in law; (d) acted in a manner which was biased against the appellant; (e) failed to consider any statutory rules or common law on matters before him; and (f) arrived at a decision against the appellant which was manifestly unreasonable that no reasonable body of person could have reached it.

**[22]** The appellant submitted that the appeals be allowed with costs or alternatively that this appellate court should remit the parts of the award in dismissing the appellant's claims (1), (2), (3), (4) and (5) to the arbitral tribunal for reconsideration and or that the award made by the arbitrator be varied and replaced by an order as follows:

A (i) the respondent shall pay to the appellant a total sum of RM3,008,681.03 being the outstanding charges for services rendered and unpaid in respect of invoices issued;

(ii) the respondent shall pay to the appellant USD60,000 being the balance agreed goodwill payment;

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(iii) the respondent shall pay to the appellant RM6,958,873.90 for the maintenance of the trailers during the period when the trailers were in the possession of the appellant;

(iv) the respondent shall pay to the appellant loss of profit of not less than C RM2,570,256; and

(v) damages for depreciation in value of the prime movers to be assessed by arbitration.

**The Respondent's Submissions**

D **[23]** The respondent submitted that no question of law arose from the question no.1, and that it in reality was a determination of facts whereas question no. 2 posed above in respect of the alleged cost of maintaining the trailers contained erroneous assumptions of facts.

E **[24]** The respondent submitted that the appellant's claim for alleged maintenance costs did not appear to be based on any recognised cause of action and the appellant had not run the said claim based on the doctrine of estoppel as sought to be posed through question no. 2. It was submitted that the doctrine of "legitimate expectation" does not give rise to a cause of action recognised in law save in cases of public law and company law oppression F petitions.

**[25]** It submitted that the arbitrator had correctly reviewed the facts and the evidence to conclude that the appellant had failed to raise the amounts claimed under this head timeously and that the appellant was not entitled to visit or revisit any alleged charges or unpaid services (denied) that accrued, G fell due or were rendered prior to the final period of invoicing under the TSA.

**[26]** It was submitted that no evidence had been adduced by the appellant to show that the appellant had indeed suffered any loss of profit and the arbitrator had expressly acknowledged this when dismissing this head of H claim.

**[27]** It was submitted that although the appellant had alleged that it could not use their prime-movers because they were paired with the detained trailers, it was raised in the arbitration whether the appellant could have I applied to the relevant authorities to decouple their prime-movers so it could use them to pull different trailers and the arbitrator had found that there were no impediments as such and that the appellant failed to cite any law that prevented them from doing so.

**[28]** Similarly, although the appellant alleged that it could not physically return nor transfer the titles in the trailers back to the respondent as required under the trust deed because the respondent had misplaced the JPJK3 forms, there was nothing stopping the appellant from obtaining fresh JPJK3 forms and completing part A and sending them over to the respondent for the transfers to be effected.

**[29]** The respondent contended that the appellant was not entitled to the second instalment of USD60,000 because there was no finding that the respondent was the cause of appellant's delay in returning the trailers and retransferring their titles and if there was any depreciation (which was denied), it was caused by the appellant's own refusal to return and retransfer the trailers.

**The Court's Decision**

**[30]** There are two separate applications made under two distinct provisions under Act 2005. Both OS applied that the final award be varied and or set aside. In OS39 the appellant raised nine 'questions of law' under s. 42 of Act 2005. The appellant gave similar grounds for both applications, except for grounds (a) and (b) in OS8.

**[31]** Section 8 of Act 2005 states that no court shall intervene in matters governed by this Act, except where so provided in this Act. We reminded ourselves of our limited appellate jurisdiction in an appeal from arbitral proceedings. This Act provides two specific provisions for recourse against awards. Section 37 provides for setting aside of domestic awards whereas under s. 42, any party may refer to the High Court any question of law arising out of an award. Where a party seeks intervention, the court is permitted to intervene only in the manner prescribed. The court is permitted to set aside an award only in the manner prescribed in s. 37(1)(a) and (b).

**[32]** Under s. 42(1), any party may refer to the High Court any question of law arising out of an award and under s. 42(1A), the High Court shall dismiss a reference made under sub-s. (1) unless the question of law substantially affects the rights of one or more of the parties. Therefore, there are two requirements for a reference; that the question of law must not only arise out of the award, but must substantially affect the rights of one or more of the parties. It has been held that short of one and the reference shall be dismissed: see the decision of the Federal Court delivered by Jeffrey Tan FCJ in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693; [2018] 1 MLJ 1.

**[33]** He went on to say that a s. 42 reference on any question of law arising out of an award is akin to an appeal on a question of law arising out of an award and in truth, such a reference is indistinguishable from an appeal on a question of law arising out of an award, referring to the Arbitration Act of UK, Singapore, Australia, New Zealand and Canada. In such an appeal on a question of law arising out of an award, the only issue is whether it can be shown that the decision of the arbitrator was wrong in law. This process comprises not only the identification of all material rules of statute and common law but also the identification and interpretation of the relevant parts of the contract and the identification of those facts which must be taken into account when the decision is reached: see judgment of Mustill J in *Vinava Shipping Co Ltd v. Finelvet AG 'The Chrysalis'* [1983] 2 All ER 658.

**[34]** The apex court was of the view that there is no universal definition of 'question of law' and that a question of construction of a document is a question of law and not one of fact and the question of law shall arise out of an award and not out of the arbitration. It also ruled that a point of law in controversy which has to be resolved after opposing views and arguments have been considered is not a 'question of law' within the meaning of s. 42 because if 'a point of law in controversy' were a question of law, then there would be a 'question of law' arising in every award and that could not be right. The apex court has set out a list of what would meet the paradigm of 'any question of law' in s. 42 which serves as a guide of what is a question of law.

**[35]** We shall deal with claim 1 and the questions posed. In its statement of claim in respect of claim 1, the appellant claimed RM3,008,681.03 being the outstanding transportation charges for services rendered and unpaid in respect of six invoices for the year 2010. The learned arbitrator had dismissed five of the invoices except for invoice KLSSB/SP/0002 for RM300,000 which he allowed partly because it was for the agreed performance bonuses at a rate of RM50,000 per year as provided for under the TSA and based on an email of 12 March 2012 the respondent had admitted that a sum of RM212,500 remained unpaid.

**[36]** We took note that in OS 8, although the appellant prayed that the final award be set aside and that the respondent shall pay the sum of RM3,008,681.03, the appellant did not contend that the award dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration or that the award contained decisions on matters beyond the scope of the submission to arbitration or that the award was in conflict with the public policy of this country.

**[37]** In question 4 in OS39, it posed the question "whether upon true construction of the contract between the parties and the law on limitation in respect of an action founded on a contract, the plaintiff could be deprived of a claim for RM2,701,476.03 (or any part thereof) incurred for services rendered to the defendant merely because the duration to make such claim in the contract was allegedly not complied with though made within the time permitted by law?" The appellant submitted that the arbitrator had failed to identify or consider any material rules of statute and common law on the doctrine of limitation in supporting his decision and in doing so had wholly disregarded the legal principles that cl. 30 was void by virtue of s. 29 of the CA as it clearly limited the time within which the appellant could enforce its right under s. 6(1)(a) of the Limitation Act. This sum was only in respect of invoice no. 5. It should be noted that the appellant did not raise in its statement of claim nor in its statement of issues to be tried that cl. 30 of TSA was void by virtue of s. 29 of the CA whereas the issue of s. 6 of the Limitation Act was raised by the respondent in its statement of defence.

**[38]** The arbitrator had dealt with cls. 13 and 30 of TSA. The provisions of the TSA must be read together and in harmony with each other. Clause 30 required the appellant to submit invoices to the respondent each month, no later than the 15th of the following month, for which the services were billed, and any item or items were disputed, the respondent might withhold payment until such time as the dispute was resolved. Under cl. 13 of TSA, the appellant was not only required to maintain complete and accurate records related to amounts billed to and payments made by the respondent, but to provide supporting documentation concerning any disputed invoice or payment within 30 days after the respondent notified the appellant of the dispute which would be subject to final adjustment and to be settled under cl. 9. These provisions were procedural and evidential in nature which they had agreed to and which applied and governed their business transactions. These provisions did not restrict the appellant from enforcing his rights under the TSA. Clause 9 specifically provides for dispute resolution, mediation and arbitration.

**[39]** Reading the record of appeal, and on the facts before him, the arbitrator had questioned the veracity of the appellant's claim in respect of these six invoices in failing to comply with the requirements of cls. 13 and 30 and failed to provide sufficient proof of its claim. The arbitrator did not rule that the appellant's claim was caught by limitation. These were findings of facts.

**[40]** Under s. 29 of the CA, every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that

extent. We emphasised the words "absolutely from enforcing his rights". Pursuant to Exception 1 and Exception 2 of s. 29, it is provided that this section shall not render illegal a contract or any contract in writing by which the parties agree any dispute between them be referred to arbitration. The parties had agreed to the arbitration agreement, had already referred their disputes to arbitration and the arbitrator had delivered his final award. The appellant was not and had not been restricted nor prevented from enforcing his rights under the TSA. Therefore cl. 30, or for that matter cls. 9 and 13, were not void by virtue of s. 29 of the CA and limitation was not and could not be an issue before us.

**[41]** In respect of claim 2 for the balance of USD60,000 for goodwill payment, the appellant submitted that it had already returned and retransferred the ownerships of the trailers to the respondent before the end of March 2014 and that the respondent should have paid the balance of USD60,000. It submitted that applying a correct interpretation of contract law would lead to one conclusion that the balance should be paid to the appellant. It was not in dispute that respondent had made the first goodwill payment of USD60,000.

**[42]** The goodwill payment was not provided for in the TSA or trust deed but in an email of 27 July 2011 where 'BP can offer a goodwill payment of total USD120,000 (into two payments) subject to alignment on the further details and following are fulfilled' which were to ensure safe, smooth and staggered operations in managing the transition starting from November to end of December which included a programme to prepare deregistration and asset transfer. It went on to say if the final two months operation are fulfilled safely, together with deregistration and asset transfer successfully done pursuant to the TSA, another goodwill payment of USD60,000 would be made end of December, an agreed appropriate portion would be paid to the drivers. It requested for further discussion on the specific plans for the transition and goodwill arrangements. The respondent sent several reminders, the last being dated 25 January 2013, but the appellant did not reply or comply.

**[43]** The parties did not refer to us any programme or specific plan to prepare deregistration and asset transfer and the timeline to do so. It was supposed to commence in November to end of December but the deregistration and asset transfer of the remaining trailers only took place in March 2014, some 27 months after expiry of the TSA and trust deed and notwithstanding the email which dealt with the goodwill payment and the reminders. It was clear the appellant did not comply with the terms of offer for the balance goodwill payment as set out in the email and it was not a smooth operation for deregistration and asset transfer. The arbitrator had

made a finding that the goodwill payment would only be payable if the appellant had carried out the obligations to physically transfer the ownership of the trailers in accordance to the terms of the letter and we were of the view that he was not plainly wrong in the finding which he did given the factual matrix of the case.

**[44]** In respect of the remaining claims including claim 3 and the other questions posed, the appellant contended that upon true construction of the contract between the parties and the delay of the respondent in de-registration and re-transferring the trailers was estopped from denying the claim for RM6,958,873.90 incurred to maintain the trailers while in its possession between 12 January 2012 to 2 April 2014 without any protest. It was submitted that there was established a legitimate expectation for the continuation of the contractual relationship between the parties and that it was entitled to claim the sum of RM6,958,873.90, loss of profit of RM2,570,256 and for damages for depreciation in value to be assessed because its prime movers could not be used for business as they were still attached to the trailers during the delay.

**[45]** The appellant specifically referred to cl. 7 of the trust deed and cl. 36 of TSA and submitted that on a proper construction of the TSA and trust deed, it was contractually obligated to deliver all the trailers to the respondent in roadworthy conditions at any time so directed or on the termination or expiry of the TSA which survived the termination or expiration of the TSA. It was submitted that the arbitrator having overlooked cls. 7 and 36, erred in his interpretation of the parties' obligation and failed to take into consideration the agreements in its entirety.

**[46]** Reading cl. 7 of the trust deed, at any time if so directed by the respondent or expiration or termination of the TSA, the appellant shall deliver such number or all of the trailers to the respondent in roadworthy conditions and shall execute and deliver all documents necessary to have the name of the appellant removed from the register of motor vehicles and the registration certificates and have the respondent or its nominee entered in place of the appellant free of all costs to the respondent save and except for the prescribed statutory costs of registering the transfers. The appellant then referred to cl. 36 of the TSA and submitted that its obligation to maintain the trailers in roadworthy conditions survived the termination or expiration of the agreement (TSA) which entitled the appellant to be paid for the maintenance costs incurred.

**[47]** Based on the record of appeal, the parties entered into the TSA and trust deed for a term of five years from 1 July 2005 to 30 June 2010, which was extended to 31 December 2011. There was a tender exercise for a new contractor to provide the transportation service and the appellant

participated in the tender but was not successful. The parties were in a transition phase (see email of 27 July 2011). It was not in dispute there was no further extension and the TSA and trust deed had expired on 31 December 2011. The arbitrator was correct in making the decision that there was no evidence which gave rise to any legitimate expectation. These were findings of facts.

**[48]** To reiterate, reading cl. 7 and cl. 36, upon expiry of the TSA and trust deed, before delivering the trailers to the respondent, the appellant was required to maintain the trailers in roadworthy conditions and this was not in dispute. The appellant contended that it had regularly sent the invoices to the respondent without any protest and was therefore entitled to be paid for the maintenance costs incurred. Sending the invoices is one thing but whether it was entitled to be paid for the maintenance costs incurred is another thing.

**[49]** On a plain reading of cl. 7, read together with cl. 36, the appellant shall deliver the trailers to the respondent in roadworthy conditions free of all costs to the respondent save and except for prescribed statutory costs of registering the transfers. These were the bargains of the parties which they agreed to. There was no submission that cl. 7, which the appellant relied on, was void, irrational or not applicable. The words "free of all costs to the respondent" meant that the respondent was not required and did not have to pay the maintenance costs incurred by the appellant to maintain the trailers in roadworthy conditions before they were delivered to the respondent, notwithstanding that the TSA and trust deed had expired. It was clear from cl. 7 that the appellant was not entitled to be paid the maintenance costs incurred.

**[50]** The appellant submitted that the arbitrator was wrong in accepting the opinion evidence of a lay witness without considering the relevant statutory provisions regulating the registration and transfer of commercial vehicle permit/license. It submitted that the loss of the JPJK3 forms and the failure of the respondent to comply with the three conditions imposed by the appellant for replacement forms had deprived the appellant of the use of its prime movers because the decoupling process of the prime movers and trailers were pending at the material time which resulted in loss of profits and depreciation in value of its prime movers.

**[51]** Reading the record of appeal, the issue before the arbitrator was, although the respondent had misplaced the JPJK3 forms and the appellant had imposed the three conditions which the appellant alleged that the respondent had failed to comply and that they were not too onerous or impossible to fulfil, could the appellant have provided the replacement forms for both parties to sign so that the registrations and transfers of the trailers

could be carried out as soon as possible instead until March 2014? In the appeals before us, counsel had referred to several emails between the parties. In an email of 30 August 2010, from the respondent to the appellant, the respondent apologised for the loss of the forms and requested to re-sign the JPJK3 forms. By an email of 2 September 2010, in reply, the appellant advised that replacement could be possible if a statutory declaration was made of the alleged loss. There was no mention of any police report or indemnity. These two emails were before the expiry of the extended TSA and trust deed which expired on 31 December 2011. The parties had nearly 15 months to try to resolve and signed replacement forms but failed. However, it was by a letter dated 17 July 2012, some seven months after the expiry of the TSA, that the appellant imposed the three conditions, after disputes arose between the parties, which complicated the situation.

**[52]** In the arbitration, the parties did not refer nor cited any relevant statutes or regulations which regulate or set out what needed to be done or complied with before the transfers of the trailers could be registered. The appellant did not refer to any provisions or rules in any statutes or regulations which required the respondent to lodge a police report, made a statutory declaration and provided a letter of indemnity before the transfers could be registered and the trailers to be returned to the respondent. We referred to the Motor Vehicles (Registration and Licensing) Rules 1959, in particular r. 9(1) therein, which merely states that "The Statement to a Director by a registered owner of a motor vehicle upon such motor vehicle passing out of his possession shall be in form JPJ K3 of the First Schedule hereto." The Rules did not impose and did not require the three conditions to be complied before the form JPJ K3 could be registered. Similarly, there were no such requirements in the TSA and trust deed.

**[53]** Therefore it was mischievous for the appellant to have submitted that the arbitrator had erred in not considering the relevant statutory provisions. The arbitrator made a finding, on the evidence before him, that there was no impediment which prevented the appellant from giving replacement forms to be signed and then lodged them for registration. This could be easily done before or after the expiry of the TSA and trust deed which fell on 31 December 2011 or as soon as possible. The facts showed that the appellant returned the remaining trailers to the respondent in March 2014 despite the reminders sent. The arbitrator found that there was no acceptable reason why the appellant had to wait for 27 months before giving the replacement forms to be signed and registered since they could be done quickly. It was incorrect for the appellant to imply or submit that the arbitrator had found that the delay in the de-registration and re-transferring the remaining trailers was caused by the respondent and the arbitrator had given his reasons why he dismissed the appellant's claim for the costs of RM6,958,873.90. Again these are findings of facts.

**[54]** There was no allegation of and there was no breach of contract or that there was a duty of care which entitled the appellant to damages or consequent loss of profit. Instead the TSA and trust deed had expired some 27 months ago and it was for the appellant to return the trailers to the respondent as soon as possible. As stated above, the appellant could easily and quickly provided the replacement forms to be signed and registered and for its prime movers to be de-coupled from the trailers so that the appellant could put the prime movers to other commercial or business use instead of waiting until March 2014 and allegedly incurring costs, loss of profit and depreciation. There was no finding that the respondent had deprived the appellant from using its prime movers upon expiry of the TSA and trust deed. On the facts and law, the claims for loss of profit and depreciation of value of its prime movers were unproven and too remote to be recoverable as damages. There was nothing to suggest that it was fair and reasonable to impose liability on the respondent for the loss of profit and depreciation. Therefore, it did not inevitably lead to one answer as submitted that the appellant was entitled to the loss of profit and depreciation claimed: see *Tenaga Nasional Malaysia v. Batu Kemas Industri Sdn Bhd & Another Appeal* [2018] 6 CLJ 683; [2018] MLJU 594.

**[55]** Lastly, on the issue of breach of natural justice, we refer to s. 37(2) of Act 2005. An award is in conflict with the public policy of Malaysia where – (a) the making of the award was induced or affected by fraud or corruption, which is not the complaint in this case, or (b) a breach of the rules of natural justice occurred (i) during the arbitral proceedings or (ii) in connection with the making of the award. We refer to grounds (a) and (b) in OS8. After perusing the record of appeal, we were of the view that the arbitrator had not acted in a manner which was biased against the appellant during the arbitral proceedings or in connection with the making of the award. We were of the view that there were no merits on this ground of complaint.

**[56]** After reading the record of appeal and the questions posed, we were unanimous that there were no merits in these appeals. The appeals were dismissed with costs of RM20,000 subject to allocator, to be paid by the appellant, and the deposit to be refunded.